United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1319

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To be argued by
Edward C. Weiner

In The
United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-1319

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

ESTELLE JACOBS
a/k/a "Mrs. Kramer,"

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

The United States of America appeals from an Order entered on July 21, 1975, in the Eastern District of New York, by the Honorable Edward R. Neaher, United States District Judge, granting a motion to dismiss a count of the indictment against Estelle Jacobs a/k/a "Mrs. Kramer."

On November 11, 1974, defendant-appellee was indicted by a grand jury for the Eastern District of New York (Indictment No. 74CR703) (App.A) for violations of 18 U.S.C. 875(c) (making extortionate threats) and 18 U.S.C. 1623 (making false declarations before a grand jury). Prior to the date set for trial, defendant-appellee moved for an evidentiary hearing and an order to dismiss the indictment. On June 6, 1975, the Honorable Edward R. Neaher heard arguments on the various pre-trial motions.

On July 21, 1975, Judge Neaher granted the motion to dismiss Count Two of the indictment (making false statements before a grand jury), holding that all of defendant-appellee's grand jury testimony must be suppressed because she was not given full Miranda warnings as required by United States v. Mandujano, 496 F.2d 1050 (5th Cir.), cert. granted, ___ U.S. ____ (No. 74-754, March 24, 1975) (App.F). The district court noted that although defendant-appellee

was given warnings under the Fifth Amendment and the Sixth Amendment, the entire grand jury proceeding was a violation of her due process rights (App.F-5).

On August 14, 1975, the Government (plaintiff-appellant) filed a timely notice of appeal from the order dismissing Count Two of the indictment. The jurisdiction of this Court is invoked under 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether warnings, including the privilege against compulsory self-incrimination, a "right to remain silent," and a right to appointed counsel, are constitutionally necessary in the grand jury setting.

2. Whether defendant-appellee's appearance before the grand jury was fair in its factual context even though she was neither advised that she was a subject of the investigation nor of the evidence against her.

3. Whether, if full Miranda warnings are required, the failure to advise defendant-appellee should result in the suppression of her testimony in a subsequent prosecution for perjury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ..

2. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

3. 18 U.S.C. 875(c) states in part:

> Whoever transmits in interstate commerce any communication containing any threat to . . . injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

4. 18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or aucillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

5. F.R.Crim.P. 6(d) states in pertinent part:

> Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session . . .

6. F.R.Crim.P. 6(e) states in pertinent part:

> Disclosure of matters occurring before the grand jury . . . may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer . . . may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding . . .

STATEMENT OF FACTS

1. From April 2, 1973, to June 20, 1973, defendant-appellee was employed as a collector for Check Adjustment Bureau, Oceanside, New York, and used the alias "Mrs. Kramer." During March 1973, Harry W. Stonesifer, Jr., used the name of his brother, William D. Stonesifer, on a gambling junket to Puerto Rico in which he incurred a debt of $5,060 (App.A-1). During May 1973, defendant-appellee worked this collection account for her employer. She made several telephone calls and on May 22, 1973, she transmitted a telephone communication to William D. Stonesifer (recorded on tape by him) which contained a threat to injure the person of Harry W. Stonesifer, Jr.

2. After the threatening telephone call, the Federal Bureau of Investigation entered the case. On September 13, 1973, defendant-appellee was interviewed. Prior to this interview, she was fully advised of her Miranda rights including the right to remain silent and the right to appointed counsel. She signed a form entitled "Interrogation; Advice of Rights" on September 13, 1973, evidencing that she understood and waived her rights (App.C). The questioning by the agents included discussion of the Stonesifer account and the fact that the defendant-appellee used the name "Mrs. Kramer" in making telephone calls on the Stonesifer account. She

denied that she harassed Harry Stonesifer's brother on the telephone (App.B-2).

3. On June 10, 1974, defendant-appellee appeared (pursuant to subpoena) before the grand jury. At the outset, the following colloquy occurred (App.D-3 to D-5):

> Q Mrs. Kramer, I want to explain to you your various Constitutional rights that you have as a witness who appears before a Federal Grand Jury. I want to tell you that this is a Federal Grand Jury inquiring into the possibility of a violation of the Federal Criminal Law, and the first right you have is the right under the Fifth Amendment to refuse to answer any question that you feel might tend to incriminate you; do you understand what your rights are under the Fifth Amendment?
>
> A Yes.
>
> Q At any time you feel the questions I am asking may tend to incriminate you, you will not be obliged to answer those questions; do you understand that?
>
> A Yes, I do.
>
> Q And now, do you understand that the Fifth Amendment privileges against self-incrimination, that that privilege is extended to you and not to any information or to any other individual that might be incriminated; do you understand that right?
>
> A Yes, I do.

Q Now, the next right you have under the Sixth Amendment, is the right to counsel; you can have a lawyer of your choice outside of the Grand Jury room to assist you with any questions that you may have a question with. You may have a question about the procedures or any specific questions, that you may have an opportunity to leave the Grand Jury room and consult with your attorney; do you understand that right?

A Yes, I do.

Q Do you have an attorney with you today?

A No, I do not.

Q Now, do you feel the need of one?

A I do not.

Q And now, at any time you feel like stepping outside the Grand Jury room to call an attorney or consult with an attorney, you let us know and we'll give you that opportunity.

A Fine.

Q Now, I want you to understand that there are Federal Laws against perjury. Perjury is a very serious offense; do you understand that?

A Yes.

Q Do you understand what perjury is?

A Yes, I do.

During this appearance on June 10, 1974, defendant-appellee was not informed that she was a target or a subject of the Grand Jury investigation. However, her interview with

the Federal Bureau of Investigation was referred to on several occasions (App.D-9 and D-45).

In order to lay the foundation for discussion of the Stonesifer account, many questions about collections work and about her employer at Check Adjustment Bureau were put to defendant-appellee. The prosecutor asked if defendant-appellee learned that Harry Stonesifer had leukemia or was dying. She answered in the negative. Then, the following exchange took place (App.D-39 to D-41):

Q I'm going to read some direct quotes to you, Mrs. Jacobs, and I want to know whether or not you said them?

"MRS. KRAMER: Well, you know what's going to happen to him one of these days.

BILL: Well, he's going to die and now that's besides the point.

MRS. KRAMER: Sooner than he expects.

BILL: No, I don't.

MRS. KRAMER: Sooner than he expects. Maybe it's going to be painful to be honest with you."

A I never said that.

Q Are you absolutely positive that you never said that?

A Absolutely positive.

Q Now, you're under oath --

A I never said that.

Q You never said to anyone these words, "Maybe it's going to be painful, to be honest with you."

A I never said it. I know I'm under oath.

Q Now, did you know the statute of perjury?

A Yes. I never said that.

Q We'll continue.

"BILL: Well, you know it's got nothing to do with me.

MRS. KRAMER: I mean it's really a shame, but he's gonna get his pretty soon, just a matter of hours to be honest with you and as I told you, I'm being honest with you. We didn't like going to the mother, but we will.

BILL: Well, you know."

Q (continuing) Do you recognize those words?

A Not exactly.

Q You had some sort of conversation?

A By the way of saying I wish you could contact your brother.

Q Did you say, "What he's going to get his pretty soon"?

A I did not.

Q You absolutely deny that statement?

A Yes. I deny it.

It is significant to note that defendant-appellee was informed that "direct quotes" were going to be read to her. It is also noteworthy that she interrupted the prosecutor to absolutely deny the threatening statement "Maybe it's going to be painful . . ." The prosecutor informed defendant-appellee that she was under oath and reminded her of the perjury statutes.

4. On November 4, 1974, defendant-appellee again appeared before the grand jury. During this appearance, she was told that she was a subject of the investigation (App. E-4). In response to questions concerning her earnings at a collection agency, defendant-appellee asserted her Fifth Amendment privilege against self-incrimination (App.E-7). In response to a question concerning receiving telephone number information, defendant-appellee asserted her Fifth Amendment privilege against self-incrimination (App.E-40). Many of the questions asked during this appearance concerned names of gambling debtors in Check Adjustment Bureau's accounts (App.E-25 to E-26). Defendant-appellee was also asked about contact with the Stonesifer family as evidenced by a credit report shown to defendant-appellee (App.E-35 to E-43). The prosecutor went through each entry and asked defendant-appellee if she obtained the information on the report or made the telephone inquiries listed - to Stonesifer's wife, mother, brother, and others.

5. On November 11, 1974, defendant-appellee was indicted by the grand jury for violations of 18 U.S.C. 875(c) (making extortionate threats) and 18 U.S.C. 1623 (making false declarations before a grand jury).

ARGUMENT

I

EVEN THOUGH DEFENDANT-APPELLEE WAS ADVISED OF HER FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS DURING HER GRAND JURY APPEARANCE, SUCH WARNINGS ARE CONSTITUTIONALLY UNNECESSARY IN THE GRAND JURY SETTING.

The warnings given defendant-appellee advised her of her basic Fifth Amendment and Sixth Amendment rights (App.D-3 to D-4). The district court, like the court in United States v. Mandujano, 496 F.2d 1050 (5th Cir.), cert. granted, ____ U.S. ____ (No. 74-754, March 24, 1975), concluded that these warnings were not sufficient. The court's contention is simple: that it is unfair and perhaps even improper to call persons to testify before the grand jury when the Government has evidence suggesting that such persons may be subject to criminal prosecution - in short, that they are "putative defendants." The remedy prescribed for this perceived impropriety is the giving of full Miranda warnings.

We contend that full Miranda warnings are inappropriate. We contend further that advising a witness (even a "putative defendant") of his Fifth Amendment and Sixth Amendment warnings is constitutionally unnecessary in the grand jury setting.

A. A WARNING TO A GRAND JURY WITNESS OF HER PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION IS CONSTITUTIONALLY UNNECESSARY.

The Fifth Amendment to the United States Constitution states in part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

The key element of the privilege against self-incrimination is compulsion. The privilege applies to proceedings before a grand jury. Counselman v. Hitchcock, 142 U.S. 547 but there is no basis in the logic or history of the Fifth Amendment for requiring Government attorneys to administer a set of preliminary warnings to any grand jury witness. The Fifth Amendment "does not preclude a [grand jury] witness from testifying voluntarily in matters which may incriminate him. United States v. Monia, 317 U.S. 424, 427. On the contrary, a grand jury witness "must claim . . . [the privilege] or he will not be considered to have been 'compelled' within the meaning of the Amendment. Id. at 427.

The failure to advise of rights does not make subsequent testimony any less voluntary.

> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of

> all the surrounding circumstances . . . [T]he failure . . . to advise [of] rights . . . [is] not in and of [itself] determinative. Schneckloth v. Bustamonte, 412 U.S. 218, 226-227.

The majority of courts that have considered the issue have concluded that no grand jury witness including a "putative defendant," is entitled to express Fifth Amendment warnings prior to testifying.[1] In the Second Circuit, this court's attention is directed to United States v. Scully, 225 F.2d 113, 116 (2nd Cir.), cert. denied, 350 U.S. 897 and United States v. Corallo, 413 F.2d 1306 (2nd Cir.), cert. denied 396 U.S. 958.

It is the particular nature and setting of incommunicado police interrogation that tends to create so great a danger of compulsory self-incrimination as to require "practical reinforcement" (Michigan v. Tucker, 417 U.S. 433, 444) of the privilege through the procedural safeguard of explicit warnings (Miranda v. Arizona, 384 U.S. 436). But the police interrogation environment

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[1]See also, United States v. DiMichele, 375 F.2d 959 (3rd Cir.), cert. denied 389 U.S. 838; Commonwealth of Pennsylvania v. Columbia Investment Corp., 325 A. 2d 289 (Pa. Sup. Ct.); State ex rel. Lowe v. Nelson, 202 So. 2d 232 (Fla. Ct. App.). But see United States v. Mandujano, supra; United States v. Wong, ____ F.2d ____ (9th Cir.) (No. 74-1636, September 23, 1974), petition for cert. pending, No. 74-635; United States v. Washington, 328 A. 2d 98, 99-100 (D.C.Ct.App.), petition for cert. pending, No. 74-1106; United States v. Luxemberg, 374 F.2d 241, 246 (6th Cir.).

contrasts sharply with the nature of the grand jury and the setting in which grand jury questioning occurs. In a grand jury investigation, to an even greater degree than in a normal consent search, "there is no evidence of any inherently coercive tactics - either from the nature of the . . . questioning or the environment in which it [takes] place. Indeed, . . . the specter of incommunicado police interrogation in some remote station house is simply inapposite." Schneckloth v. Bustamonte, supra, 412 U.S. at 247.

Even a brief glimpse at the Miranda opinion reveals how different grand jury questioning is from the factors that troubled the United States Supreme Court in Miranda. As that opinion noted, the danger of compulsion during police interrogation arises principally from the fact that the interrogation occurs in private. "The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy - being alone with the person under interrogation'" (384 U.S. at 449; emphasis in original). Privacy is "essential to prevent distraction and to deprive [a suspect] of any outside support" (id. at 455). The police may then "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights" (ibid.). Privacy also permits the police to resort to "third degree" tactics, subjecting the suspect to mental or physical exhaustion over long periods of time (ibid.).

Indeed, "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery" (id. at 461). By contrast to the incommunicado setting in which police interrogation occurs, grand jury questioning takes place in the presence of no fewer than 16 private citizens (F.R.Crim.P. 6(a)) who -

> bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecutioning attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. [In re Groban, 352 U.S. 330, 346-347 (Black, J., dissenting; emphasis supplied).]

Moreover, grand jury questioning is at all times under the supervision of a presiding judge, and a transcript is often made of the proceedings (as was done in the instant case). Accordingly, there is little if any likihood that a Government attorney who questions a witness on behalf of the grand jury could resort to any of the coercive tactics potentially employable by police officers during incommunicado police interrogation. Nor, unlike police interrogation where "[p]rivacy results . . . in a gap in [judicial] knowledge as to what in fact goes on in the interrogation rooms" (Miranda, supra, 384 U.S. at 448), is there the

possibility that - should coercive tactics be employed during grand jury questioning - it may go undetected and be unreviewable on a subsequent claim that the privilege was violated.

Nor does compliance with a subpoena to testify before the grand jury deprive a person of "his freedom of action in any significant way" - a factor that the court in Miranda construed to be a hallmark of "custody" since it is the "point that our adversary system of criminal proceedings commences" (384 U.S. at 477). To the contrary, as noted in United States v. Dionisio, 410 U.S. 1, 10:

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" . . . . "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." [Citations omitted.]

Moreover, the recipient of a grand jury subpoena, unlike an arrestee, has an opportunity in advance of questioning to consult with counsel and friends and decide to what extent (if at all) he will respond to questioning. In addition, he can refuse compliance and subsequently contest

the legality of a subpoena in a show cause hearing. United States v. Ryan, 402 U.S. 530, 533; Cobbledick v. United States, 309 U.S. 323. And, after he has appeared, he is free to resume his daily activities. See United States v. Calandra, 414 U.S. 338, 343.[2]

Finally, it should be recognized that the institution of the grand jury - unlike custodial police interrogation - is deeply rooted in Anglo-American history, serving for centuries "both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action." United States v. Calandra, 414 U.S. 338, 343. The founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." See Costello v. United States, 350 U.S. 359, 361-362.

The grand jury's historic functions survive to this day. "Its responsibilities continue to include . . . the protection of citizens against unfounded criminal

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[2]It has generally been recognized heretofore that in responding to a grand jury subpoena a witness is not placed in "custody." See, e.g., United States v. Binder, 453 F.2d 805, 809 (2nd Cir.); Gollaher v. United States, 419 F.2d 520 (9th Cir.), cert. denied, 396 U.S. 960; Kitchell v. United States, 354 F.2d 715 (1st Cir.); United States v. Capaldo, 402 F.2d 821 (2nd Cir.); Jones v. United States, 342 F.2d 863 (D.C.Cir.).

prosecutions," United States v. Calandra, supra, 414 U.S. at 343, and the scope of its powers continues to reflect its "special role in insuring fair and effective law enforcement" (ibid.). See also Branzburg v. Hayes, 408 U.S. 665, 686-700. Indeed, precisely because of its special constitutional role (and in sharp contrast to custodial police interrogation), "the long-standing principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings" (Branzburg v. Hayes, supra, 408 U.S. at 688), where the duty to testify has long been recognized as a basic obligation that every citizen owes to his Government. Blackmer v. United States, 284 U.S. 421, 438.

The district court imposes on this constitutional process the administration of a set of warnings - "not themselves rights protected by the Constitution" (Michigan v. Tucker, supra, 417 U.S. at 444) - that are likely to discourage citizens from providing the grand jury with information it needs to carry out its functions under the Fifth Amendment (it seems to be the premise of the court's decision that the witness who has been warned will be less likely to testify fully and freely). The Miranda warnings, however, were never intended to create "a constitutional strait jacket" (Miranda, supra, 384 U.S. at 467) to be applied across the board to every form of official questioning. The words of the Supreme Court in delimiting its holding in that opinion are especially pertinent with regard to its inapplicability to grand jury proceedings (id. at 477-478):

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

B. A WARNING TO A GRAND JURY WITNESS OF HER "RIGHT TO REMAIN SILENT" IS CONSTITUTIONALLY UNNECESSARY.

There is no "right to remain silent" contained in the Fifth Amendment. A witness appearing before a grand jury has no such across-the-board right. Rather, he may claim his Fifth Amendment privilege against compulsory self-incrimination only when it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v. United States, 341 U.S. 479, 486-487.

We contend that no one is entitled to remain silent before the grand jury. Defendant-appellee and others owe their testimony. Defendant-appellee owed her testimony concerning Check Adjustment Bureau and even the Stonesifer account. Only when the answers to questions may tend to incriminate, may a person (including a "putative

defendant") refuse to answer. See United States v. Monia, supra, 317 U.S. at 427; United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 113; United States v. Kordel, 397 U.S. 1, 10. Furthermore, the witness' decision about the potentially self-incriminating nature of the question is not necessarily determinative. If the court decides that he has improperly invoked the privilege, he must nevertheless answer the question. Hoffman, supra; see Maness v. Meyers, ____U.S. ____ (No. 73-689, January 15, 1975). And even if he has properly invoked the privilege, he may nevertheless be compelled to respond, under penalty of contempt, if the court grants him immunity coextensive with the privilege. Kastigar v. United States, 406 U.S. 441. Moreover, once he proffers an incriminating fact, he cannot then refuse to testify further regarding details of that fact. Rogers v. United States, 340 U.S. 367, 373.[3]

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[3]The decisions of the United States Supreme Court are explicit in holding that the privilege "is solely for the benefit of the witness" United States v. Murdock, 284 U.S. 141, 148, and "is purely a personal privilege of the witness." Hale v. Henkel, 201 U.S. 43, 69. A refusal to answer cannot be justified by a desire to protect others from punishment, Brown v. Walker, 161 U.S. 591, much less to protect another from interrogation by the grand jury, Rogers v. United States, supra, 340 U.S. at 371.

It has been thought necessary, in order to safeguard the privilege against compulsory self-incrimination, to advise individuals of a "right to remain silent" during police interrogation in part to counteract the possibility that a decision to speak about non-privileged matter in that setting could be used by the police (through trickery, cajolery or other incommunicado tactics) as a means of eliciting incriminating matter (see Miranda, supra, 384 U.S. at 476-477). Realistically, the "right to remain silent" is, in this context, simply a recognition that the police (in contrast to grand juries) are not empowered in our legal system to demand that citizens respond to their inquiries. This "right to remain silent" in the face of police interrogation, moreover, is by no means confined to "putative defendants" but extends to the most upright and law-abiding citizen as well.[4]

The district court's equation of the grand jury with the police in this context, aside from being at sharp odds with precedent, is also unjustifiable as a matter of constitutional policy. It materially undermines the grand

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[4] Similarly, a defendant's right not to take the stand at his trial on criminal charges derives from the possibility that his invocation of the privilege as to particular questions might permit the jury to draw an ineradicably prejudicial inference of guilt (see United States v. Scully, supra, 225 F.2d at 115-116). Neither of these special considerations is present in the context of a grand jury investigation.

jury's legitimate power of investigation and gives witnesses such as defendant-appellee, who possess information material to the grand jury's investigation, the power effectively to block or impede the grand jury's inquiry into non-privileged matter. In the grand jury's context the privilege against compulsory self-incrimination traditionally stands as an exception to the 'longstanding principle that 'the public . . . has a right to every man's evidence.'" Branzburg v. Hayes, supra, 408 U.S. at 688. Indeed, "[t]he duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status," United States v. Calandra, supra, 414 U.S. at 345, yet the public's overriding interest in full disclosure before the grand jury may not be overborne except by a valid self-incrimination claim (or other recognized testimonial privilege). As the Supreme Court has repeatedly recognized, "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." United States v. Calandra, supra, 414 U.S. at 344, citing Branzburg v. Hayes, supra, 408 U.S. at 700; Costello v. United States, 350 U.S. 359, 364.

C. A WARNING TO A GRAND JURY WITNESS OF HER RIGHT TO APPOINTED COUNSEL IS CONSTITUTIONALLY UNNECESSARY.

The Sixth Amendment to the United States Constitution states in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The right to appointed counsel for a grand jury witness was not actually discussed by the district court. However, the court does point out in discussing United States v. Mandujano, supra, that the questioning proceeded without full Miranda warnings including the right to appointed counsel (App.F-2 to F-3). It is clear that defendant-appellee was not warned of such a right. But it is appropriate to note that, while defendant-appellee was not told she could have appointed counsel in the precise words of the Miranda warning, she was told that she could halt the proceedings at any time if she felt the need to consult a lawyer (App.D-4):

> Q Now, the next right you have under the Sixth Amendment, is the right to counsel; you can have a lawyer of your choice outside of the Grand Jury room to assist you with any questions . . . You may have an opportunity to leave the Grand Jury room and consult with your attorney; do you understand that right?
>
> A Yes, I do.
>
> Q Do you have an attorney with you today?
>
> A No, I do not.
>
> Q Now, do you feel the need of one?
>
> A I do not.

Q And now, at any time you feel like stepping outside the Grand Jury room to call an attorney or consult with an attorney, you let us know and we'll give you that opportunity.

A Fine.

The determination that a right to appointed counsel exists for grand jury witnesses (even "putative defendants") reflects an unwarranted and totally inappropriate application to grand jury investigations of the rationale of Miranda, where access of an arrested suspect to the advice of counsel prior to custodial interrogation was considered necessary to counteract the special hazards of compulsion found to be prevalent in that context. With those fears absent in the grand jury setting, for the reasons already discussed, gone too is the need for the special prophylactic measures prescribed by Miranda.

It could be argued that it might be desirable as a matter of policy to provide grand jury witnesses who are potential defendants with appointed counsel if they cannot afford their own, but it is not constitutionally mandated.[5] To the contrary, the Supreme Court has

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[5]Although there is considerable doubt that such a practice is authorized by statute (see note 7, infra), we understand that it is common practice in the federal system to appoint counsel for indigent grand jury witnesses requesting such assistance, and it seems likely that a request by defendant-appellee for appointment of counsel would have been honored.

recognized that the Constitution does not require that grand jury witnesses be represented by counsel (In re Groban, supra, 352 U.S. at 332-333):

> A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, . . . [although] evidence obtained may possibly lay a witness open to criminal charges. . . . Until [such charges are made] his protection is the privilege against self-incrimination. [Citations omitted.][6]

Miranda's creation of "a limited Fifth Amendment right to counsel" (Miranda, supra, 384 U.S. at 537, White, J., dissenting) during custodial police interrogation, where "circumstances . . . can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators" (id. at 469), is manifestly inapplicable to grand jury investigations, for the reasons already stated. Nor can such an alleged right of access to counsel during grand jury investigations be found in the Sixth Amendment.

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[6] In rejecting claims of a right to counsel before the grand jury, courts generally have not distinguished between the presence of counsel in the grand jury room and access to counsel outside the room. See, e.g., Directory Services, Inc. v. United States, 353 F.2d 299 (8th Cir.); Gollaher v. United States, 419 F.2d 520 (9th Cir.), cert. denied, 396 U.S. 960; In re Grumbles, 453 F.2d 119 (3rd Cir.); Harris v. Beto, 438 F.2d 116 (5th Cir.). A few courts, however, have expressly rejected the notion that the Fifth Amendment requires that a grand jury witness have access to counsel within or without the grand jury room. See United States v. Daniels, 461 F.2d 1076 (5th Cir.); United States v. DeSapio, 299 F. Supp. 436, 440 (S.D.N.Y.).

While the Supreme Court initially embarked on a course that might ultimately have led to recognition of a Sixth Amendment right to counsel for "putative defendants" (see Escobedo v. Illinois, 378 U.S. 478), it quickly abandoned that analysis in Miranda and has recently indicated that the Sixth Amendment right to counsel does not attach prior to "[t]he initiation of judicial criminal proceedings." Kirby v. Illinois, 406 U.S. 682, 689; Michigan v. Tucker, supra, 417 U.S. at 438.[7]

Although there has been, since the decision in Groban, a considerable expansion of constitutionally recognized procedural rights of actual and even prospective criminal defendants, including the right to counsel at various post-arrest or post-indictment stages (e.g., Hamilton v. Alabama, 368 U.S. 52; Mempa v. Rhay, 389 U.S. 128), the Court has been at pains to make clear that these requirements are not automatically to be extended

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[7]While not conclusive of the constitutional question, we note that, unless a Sixth Amendment right to counsel has attached, a grand jury witness who is not under arrest and has not been formally charged has no right to appointed counsel under the Criminal Justice Act of 1964. See 18 U.S.C. 3006A(a). Moreover, F.R.Crim.P. 6(d) expressly limits the persons who may be present while the grand jury is in session to "[a]ttorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking evidence, a stenographer or operator of a recording device."

to the necessarily wide-ranging and traditionally non-adversarial grand jury context. See Jenkins v. McKeithen, 395 U.S. 411, 430; Hannah v. Larche, 363 U.S. 420, 449.

II

EVEN THOUGH DEFENDANT-APPELLEE WAS NEITHER ADVISED THAT SHE WAS A SUBJECT OF THE GRAND JURY INVESTIGATION NOR OF THE EVIDENCE AGAINST HER, THE GRAND JURY PROCEEDING WAS FAIR IN ITS FACTUAL CONTEXT.

The procedure utilized in the grand jury was fair and did not constitute prosecutorial misconduct. The district court seemed to believe that the Government should have warned defendant-appellee that she was a subject or target of the investigation and of "the trap she was being led into." The court's argument leads one to the conclusion that the prosecutor should have disclosed the fact that there was a tape recording of defendant-appellee. We contend that such disclosure of evidence is contrary to F.R.Crim.P. 6(e). We further contend that there was a legitimate investigatory purpose for calling defendant-appellee before the grand jury.

1. It is clear and we concede that defendant-appellee was a "putative defendant" - i.e. the Government had incriminating evidence against her. However, this fact alone, we submit, has no constitutionally significant

bearing on the question whether her testimony had been compelled in violation of the Fifth Amendment.[8]

Indeed, the district court's opinion gives no indication of why or how "putative defendant" status bears on the question of compulsion. The opinion simply makes the assumption that because defendant-appellee was not told she was a subject in the grand jury room on June 10, 1974 that somehow the Due Process clause of the Fifth Amendment had been violated (App.F-5). The district court makes no mention of the fact that defendant-appellee was fully advised of her Miranda rights by the Federal Bureau of Investigation on September 13, 1973 and that she signed a form entitled "Interrogation; Advice of Rights" (App.C). The court also neglects to mention that much of the material concerning the Stonesifer account was discussed with defendant-appellee by the Federal Bureau of Investigation prior to her appearance in the grand jury (App.B-1 to B-3). In this factual context, we submit that there was no denial of due process.

In fact, we submit that a witness's answers before the grand jury are no more likely to be compelled

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[8]Standard 3.6(d) of the American Bar Association Project on Standards for Criminal Justice, The Prosecution Function (cited by the district court) was complied with in that defendant-appellee's testimony was not compelled in any way.

because he is suspected of involvement in the criminal activities that the grand jury is investigating than if he is not. Such a person may, like any other witness, claim the Fifth Amendment privilege as an alternative to self-incrimination. He is certainly no more likely to be ignorant of his Fifth Amendment privilege than any other witness who, like "virtually every schoolboy[,] is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . ..'" Michigan v. Tucker, supra, 417 U.S. at 439.

To be sure, one suspected of involvement in the type of criminal activity under investigation faces a greater likelihood that he will be asked questions calling for responses that may be incriminating. But that fact alone has no bearing upon the voluntariness of the responses. "The obligation to appear [before the grand jury] is no different for a person who may himself be the subject of the grand jury inquiry." United States v. Dionisio, 410 U.S. 1, 10, n. 8. Once called, his responses are presumed to be as voluntary as those of any other witness.

Even in the Miranda context of police interrogation, the "putative defendant" concept is irrelevant in defining the right to warnings. If the police arrest a citizen and take him to the stationhouse for interrogation, he is

entitled to Miranda warnings even if the police have no basis for suspecting him of a crime and no intent to prefer charges against him.

Nor is a grand jury witness against whom the Government has incriminating evidence thereby "in custody" or otherwise "deprived of his freedom of action in any significant way" to a greater extent than a normal grand jury witness. Our adversary system of criminal proceedings is triggered by discrete Governmental procedures, such as arrest or indictment, that impose particular restraints distinct from the kind of restraints imposed upon all citizens as a result of their obligations of citizenship. See Escobedo v. Illinois, 378 U.S. 478, 490-491.

The Government's mere knowledge or intention with regard to a particular individual, unaccompanied by any action or procedure that treats him differently from other individuals with whom the Government deals - such as other grand jury witnesses who are called to testify because they also are likely to possess information useful to enable the grand jury to fulfill its constitutional function - does not itself initiate criminal proceedings or result in "custody." See Kirby v. Illinois, 406 U.S. 682, 689. "The test [for determining "custody"] must be an objective one. Clearly the Miranda court meant that something more than official interrogation must be shown. It is hard

to suppose that suspicion alone was thought to constitute that something; almost all official interrogation of persons who later become criminal defendants stems from that very source." United States v. Hall, 421 F.2d 540, 544 (2nd Cir.) (Friendly, J.; emphasis in original); see also Lowe v. United States, 407 F.2d 1391 (9th Cir.); United States v. Sicilia, 475 F.2d 308 (7th Cir.).

2. It is true that the Government had in its possession a tape recording and a transcript of a telephone conversation allegedly between defendant-appellee and William D. Stonesifer. This constituted evidence before the grand jury and therefore was subject to the rules of secrecy. F.R.Crim.P. 6(e) states in part:

> Disclosure of matters occurring before the grand jury . . . may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer . . . may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding . . .

Defendant-appellee's suggestion apparently adopted by the district court that the Government should have told defendant-appellee that there was a tape recording and let her listen to it contravenes F.R.Crim.P. 6(e). We submit that the recorded conversation was a matter "occurring

before the grand jury" in that at the time of defendant-appellee's appearance on June 10, 1974, William D. Stonesifer had already appeared and presented the information about the tape recorded conversation.

Grand jury secrecy promotes certain objectives in the criminal justice system. It prevents the escape of persons whose indictment may be contemplated. It insures the utmost freedom to grand jurors in their deliberations. It protects witnesses who appear before the grand jury and protects them against tampering or subornation of perjury. It encourages free and untammeled disclosures by persons who have information with respect to crime. Finally, grand jury secrecy protects innocent accuseds. See United States v. Badger Paper Mills, Inc., 243 F.Supp. 443 (E.D.Wis.) and Allen v. United States, 390 F.2d 476 (D.C.Cir.). We submit that no forewarning of the Government's evidence against defendant-appellee is required and that such disclosure of the tape recording or transcript of conversation would contravene F.R.Crim.P. 6(e).

3. There were many cogent investigatory reasons for calling defendant-appellee before the grand jury. The subpoena to testify was not issued with entrapment in mind. The Government does not implant the design to commit perjury in the mind of a grand jury witness. The district court's

statement that "Had the questions served some useful investigatory function, the conclusion might be otherwise" deserves careful examination in light of the many detailed inquiries of defendant-appellee. It is noteworthy that of the 108 transcribed pages of grand jury testimony (46 pages on June 10, 1974 and 62 pages on November 4, 1974), the district court only had before it a few quoted pages included in defendant-appellee's motion papers (App.D-1 to D-4 and D-38 to D-42 and E-1 to E-4). We submit that the district court's conclusion that "the questions which led to the alleged perjurous responses served no other function than to give the Government an additional prop on which to base its case against defendant" (emphasis in original) is based on less than the full record.

The full record indicates that defendant-appellee was interviewed by the Federal Bureau of Investigation on September 13, 1973 and was asked about collections work at Check Adjustment Bureau including the Stonesifer account (App.B). She testified before the grand jury on June 10, 1974 and was asked also about collections by Prompt Reports (another collection agency which employed her); she gave background information on Frank Provenzano of Check Adjustment Bureau (App.D-16 and D-37) and Walter Cox of Prompt Reports (App.D-9). She defined what was meant by "skip tracing" (App.D-11) and described how to locate a debtor.

She was questioned in general about gambling junket accounts (App.D-12 to D-13). She admitted using the name "Mrs. Kramer" in calls on gambling accounts (App.D-14). She was asked about gambling markers (App.D-16 to D-17) and collection techniques (App.D-19). She was asked about sending collectors out on specific accounts (App.D-21); she was asked about the use of threats over the telephone (App.D-22). She was asked about the Times Square Stores account at Check Adjustment Bureau (App.D-24 to D-25). She was asked whether Frank Provenzano carried a gun (App.D-24 to D-25). She was asked how many calls she made on the Stonesifer account (App.D-27). She was asked about calling Stonesifer's wife, mother, brother, and others (App.D-27 to D-29). She was asked about other gambling junket debtors (App.D-29 to D-36). All of these matters were discussed prior to the time that the alleged perjury occurred when the prosecutor said, "I'm going to read some direct quotes to you, Mrs. Jacobs, and I want to know whether or not you said them?" (App.D-39)

Defendant-appellee also testified before the grand jury on November 4, 1974. Many additional informational questions were asked including whether Frank Provenzano used an alias on the telephone (App.E-11), how Provenzano got the gambling accounts (App.E-13), and

whether Provenzano tape recorded telephone conversations (App.E-20 to E-21). She was also asked about some additional gambling accounts (App.E-25 to E-26).

As has been demonstrated the Government's motive in summoning this "putative defendant" before the grand jury was legitimate. It was to secure information about the collection of gambling debts and to inquire of a witness who was also suspected of criminal activity. There was no "baiting" the witness into committing perjury. If defendant-appellee decided to lie, that was her choice. We submit that the grand jury proceeding was fair in its factual context.

III

THE FAILURE TO ADVISE DEFENDANT-APPELLEE OF HER FULL MIRANDA WARNINGS SHOULD NOT RESULT IN THE SUPPRESSION OF TESTIMONY IN A SUBSEQUENT PROSECUTION FOR PERJURY.

The remedy of suppression of defendant-appellee's testimony in a subsequent prosecution for perjury envisioned by the district court is unwarranted by policy and precedent.[9]

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[9] Virtually every other court that has considered the issue has concluded that even if putative defendants are entitled to some Miranda warnings, failure to give the warnings does not license them to commit perjury. See, e.g., United States v. Winter, 348 F.2d 204 (2nd Cir.), cert. denied, 382 U.S. 955; United States v. Parker, 244 F.2d 943 (7th Cir.) cert. denied, 355 U.S. 836; United States v. DiGiovanni, 397 F.2d 409, 412 (7th Cir.), cert. denied, 393 U.S. 924; United States v. Nickels, 502 F.2d 1173 (7th Cir.); Cargill v. United States, 381 F.2d 849 (10th Cir.), cert. denied, 389 U.S. 1041; United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088, stay granted, January 16, 1975; see also United States ex rel. Annunziato v. Deegan, 440 F.2d 304, 306 (2nd Cir.); United States v. Pacente, 490 F.2d 661 (7th Cir.), rehearing en banc, 503 F.2d 543, cert. denied, 419 U.S. 1048; but see United States v. Mandujano, supra and United States v. Wong, supra.

1. "[T]he immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." Glickstein v. United States, 222 U.S. 139, 142. See also Harris v. New York, 401 U.S. 222, 225; Bryson v. United States, 396 U.S. 64, 72. A witness may properly resist efforts to compel him to incriminate himself (see, e.g., Lefkowitz v. Turley, 414 U.S. 70, 78), and if he submits to such efforts, his incriminating statements may be excludable from future substantive use by the prosecution (id. at 79-80; Maness v. Meyers, supra, opinion of Mr. Justice White). But he may not avoid compulsion by committing perjury. "Our legal system provided methods for challenging the Government's right to ask questions - lying is not one of them." Bryson, supra, 396 U.S. at 72.

United States v. Knox, 396 U.S. 77, demonstrates the applicability of this proposition to the instant case. There, the defendant had been charged with making false statements in wagering tax forms required by a statute declared unconstitutional in Marchetti v. United States, 390 U.S. 39, and Grosso v. United States, 390 U.S. 62. The district court dismissed the indictment, reasoning that the defendant could not be prosecuted for failure to answer the wagering form truthfully because the Fifth Amendment privilege would have prevented his prosecution

for failure to answer the form's questions in the first place.

While the Court agreed that the statute in question "injected an element of pressure into [the defendant's] predicament at the time he filed the forms" (396 U.S. at 82), it held that the defendant's perjury was nevertheless not excusable on Fifth Amendment grounds. It reasoned that in making the false statements the defendant took "a course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take . . ." (ibid.). Rather than inculpate himself in a criminal act occurring in the past, the defendant had in effect committed a new criminal act. "[W]hen [he] responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion" (ibid.).

The same reasoning would apply even more forcefully to the instant case. If it is impermissible to lie to the Government in the face of the degree of palpable, overt compulsion that confronted Knox, it is manifestly impermissible to answer falsely when, as here, defendant-appellee has every reason to believe that the privilege is fully available.[10] Indeed, defendant-appellee was

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[10]At the time Knox filed his wagering tax form, the decisions in United States v. Kahriger, 345 U.S. 22, and Lewis v. United States, 348 U.S. 419, apparently validated the compulsory requirement of filing such forms.

expressly warned prior to testifying that "you will not be obliged to answer those questions [which would incriminate you]."

2. The district court as did the court of appeals in Mandujano, supra, nevertheless found the principle enunciated in the Glickstein-Bryson-Knox line of cases inapplicable to a "putative defendant" who, without prior benefit of Miranda warnings, lies to the grand jury. Evidently recognizing that suppression of such false testimony could not be justified by reference to the self-incrimination provision of the Fifth Amendment, it sought to rest its conclusion on a characterization of the Government's conduct in bringing defendant-appellee before the grand jury without providing full Miranda warnings as being "beyond the pale of permissible prosecutorial conduct." (emphasis in original). This was because the court felt that defendant-appellee was being confronted with a "Hobson's choice" between self-incrimination and perjury, and the attorney's questioning was primarily baiting Jacobs to commit perjury.

There are, it seems to us, numerous difficulties with the district court's effort to support its holding on this "due process" rationale. To begin with, it is difficult to see how it was more unfair to ask defendant-appellee

questions before the grand jury than it was to require Knox to file a wagering tax form confessing involvement in criminal activities; indeed, unlike Knox, defendant-appellee had the unchallenged right to decline to give incriminating answers. Second, the "Hobson's choice," while reminiscent of the "cruel trilemma of self-accusation, perjury or contempt" decried in Murphy v. Waterfront Commission, 378 U.S. 52, 55, is critically different in that defendant-appellee had (and was told she had) the right simply to refuse to answer questions encroaching on areas of potential self-incrimination. See Michigan v. Tucker, supra, 417 U.S. at 445.

In seeking to peg its decision on due process grounds, the district court also entirely overlooked the long line of decisions of the Supreme Court prior to Miranda evaluating the voluntariness and admissibility of statements obtained by interrogation of persons suspected of criminal offenses. The governing criterion in such inquiries was whether the defendant was subject to physical or psychological coercion of such a degree that his "will was overborne at the time" the statements in issue were made. See, e.g., Haynes v. Washington, 373 U.S. 503, 513; Lynumn v. Illinois, 372 U.S. 528, 534. Thus, even where a defendant was subjected to incommunicado police interrogation for over twelve hours, during the

last seven of which requests by his family and attorney to speak with him were refused by the police, there was no deprivation of due process. Cicenia v. Lagay, 357 U.S. 504.[11] Certainly the interrogation of defendant-appellee before the grand jury in the present case was not as coercive as that of Cicenia, let alone resembling the kind of interrogative tactics, such as physical abuse (Brown v. Mississippi, 297 U.S. 278), prolonged isolation from family or friends in a hostile setting (Gallegos v. Colorado, 370 U.S. 49), or extended and exhausting interrogation (Watts v. Indiana, 338 U.S. 49), that the Supreme Court has considered to violate due process requirements.

These considerations aside, we urge this court to reject the underlying premise of the district court's decision - that it is inherently unfair to call as grand jury witnesses individuals known or suspected by the Government to have some involvement in the kinds of criminal activity under investigation by the grand jury. Common sense tells us that the court was on shaky ground in positing malign motives in the decision to call defendant-appellee before the grand jury and question her in the fashion that she was questioned. See Part II, supra.

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[11] While the holding in Cicenia was arguably inconsistent with that in Escobedo, the latter decision was predicated on Sixth Amendment rather than due process grounds. The Escobedo rationale was in turn abandoned in favor of a self-incrimination analysis in Miranda.

If the grand jury is to have any realistic hope of succeeding in the mission of ferreting out unreported crime and corruption, it is critically dependent on the ability to obtain information from witnesses such as defendant-appellee, who, by virtue of her involvement in and association with the activities under investigation, are most likely to possess the kind of information that is indispensable to a successful inquiry. And even when a witness is a prime target, she may wish to confess her part in the offense (the Constitution reflects no policy against voluntary confessions) or may be able to exculpate herself to the satisfaction of the grand jury. See United States v. Winter, supra. "Obviously many investigations would be incomplete and superficial if the grand jury failed to call those persons who appear to know the most about matters under inquiry." United States v. Sweig, 441 F.2d 114, 121 (2nd Cir.), cert. denied, 403 U.S. 932.

As this court recently said in United States v. Del Toro and Kaufman, Nos. 74-2021, 74-2035, decided February 27, 1975 (slip op., p. 1973): "It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth." So long as the witness's will has not been overborne by threats, trickery, or other forms of actual coercion, the privilege against self-incrimination has not been offended, and due process of law has been accorded.

3. Apparently being of the view that the only sensible thing for defendant-appellee to have done when called before the grand jury was to invoke her privilege and refuse to answer questions, and that it was seriously improper for the Government attorney to hope that she would voluntarily supply truthful information to the grand jury, the district court seemed to conclude that the action of the attorney "smacks of entrapment." (App.F-3). The court did not indicate whether it was in fact holding that defendant-appellee had been entrapped; but a holding that a "putative defendant" who lies to a grand jury has been entrapped into committing perjury (either by the bare fact that she was called to testify or by the failure to give Miranda warnings) cannot be reconciled with the concept of entrapment as it has been articulated by the United States Supreme Court.

Entrapment exists only when Government officials "implant in the mind of an innocent person the disposition to commit the alleged offense," Sorrells v. United States, 287 U.S. 435, 442; United States v. Russell, 411 U.S. 423, 436. Here, however, there was no evidence that the Government implanted in defendant-appellee's mind the design to commit perjury or in any way thwarted whatever predisposition to tell the truth she might have had. Indeed, at the outset of her appearance before the grand jury she was expressly warned - in addition to being told that she need not answer questions which would tend to incriminate her - that if she lied she could be prosecuted for perjury.

Nor is there any basis for concluding that the conduct of the prosecutor in calling defendant-appellee to testify before the grand jury about collection agencies and her collection efforts was "so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction, cf. Rochin v. California," United States v. Russell, supra, 411 U.S. at 431-432. In obtaining defendant-appellee's perjured statements, the Government neither subjected her to any hardship nor violated any of her fundamental rights. Nor did it deceive her, or in any way participate in an unlawful practice. Cf. Lewis v. United States, 385 U.S. 206. Its tactic, designed primarily to aid the grand jury in ascertaining whether a crime had been committed and if so by whom, can hardly be said to violate "fundamental fairness" or be "shocking to the universal sense of justice" (Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246) because it incidentally forced defendant-appellee to choose between entirely legitimate alternatives - asserting her privilege or truthfully admitting she made the statements to Stonesifer and explaining them. That she chose instead to adopt the wholly illegitimate alternative of committing perjury cannot be attributed to any action that the Government took or failed to take. See United States v. Nickels, supra;

United States v. Fiorillo, 376 F.2d 180, 184 (2nd Cir.); United States v. Lazaros, 480 F.2d 174 (6th Cir.), cert. denied, 415 U.S. 914.[12]

4. Finally, even if this court concludes that questioning of "putative defendants" without full Miranda warnings is an improper procedure, it is unnecessary to adopt an exclusionary rule to assure compliance with the proper procedure. Unlike the Fourth Amendment exclusionary rule, which is deemed necessary because there is considered to be no other practical means of correcting and forestalling police behavior in violation of the rights protected by that provision, an exclusionary principle in this context would be addressed to regulation of the conduct of Government attorneys. There is no reason to suppose that there would be any significant incidence of disobedience

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[12]The Government's questioning of a witness suspected of having taken part in a criminal offense is different from the abuse of process resulting from repeated summoning of a witness even once before a tribunal without jurisdiction to conduct the inquiry, where such action is apparently designed solely to maximize the opportunity for perjury. See Brown v. United States, 245 F.2d 549, 555 (8th Cir.); United States v. Thayer, 214 F.Supp. 929 (D. Colo.); United States v. Cross, 170 F.Supp. 303 (D. D.C.); United States v. Icardi, 140 F.Supp. 383 (D. D.C.); United States v. Fruchtman, 282 F.Supp. 534 (N.D. Ohio); see also LaRocca v. United States, 337 F.2d 39, 43 (8th Cir.).

by such attorneys to a requirement to administer warnings to witnesses; accordingly, the drastic remedy of exclusion of relevant evidence in criminal cases is not warranted here.

Even assuming that an exclusionary rule were considered necessary for failures to warn, the deterrent purposes of such a rule would be amply served by providing for exclusion of the testimony from use in a trial of the substantive offense (here, making extortionate threats). There would be little or no marginal deterrent effect from the radical measure of suppression in a perjury prosecution. See United States v. Calandra, supra, 414 U.S. at 348.

Finally, with regard to the propriety of the sanction of suppression in the present case, we note that there is no reason to believe that any deficiency in the warnings actually administered was deliberate. As the Supreme Court recently noted, "[t]he deterrent purpose of the exclusionary rule necessarily assumes . . . willful, or at the very least negligent, conduct . . .. Where the official action was pursued in complete good faith, . . . the deterrence rationale loses much of its force." Michigan v. Tucker, supra, 417 U.S. at 447. Suppression of the allegedly perjurious testimony was an inappropriate remedy in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court be reversed, that Count Two of the indictment be reinstated, and that the matter be remanded to the district court.

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CERTIFICATE OF SERVICE

I certify that two (2) copies of the foregoing BRIEF FOR THE UNITED STATES OF AMERICA along with two (2) copies of the APPENDIX (Separately bound) have been mailed this 1st day of October 1975 to:

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